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Monday, August 23, 1999

DO NOT PUBLISH

**UNITED STATES BANKRUPTCY COURT NORTHERN DISTRICT OF CALIFORNIA**

In re:

No. 98-3-4290-SDM

Chapter 7

PATRICIA A. McCOLM,  
Debtor.

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PATRICIA A. McCOLM,  
Plaintiff,

A.P. No. 99-3-104-TC

vs.

STEVEN THEOHARIS; ANITA THEOHARIS;  
CITY AND COUNTY OF SAN FRANCISCO;  
JUDY BOYAJIAN; WALT DISNEY CORPORATION;  
JEFFREY NEVIN; FIREMAN'S FUND  
INSURANCE COMPANIES, INC.;  
JAMES SCHRATZ; and DOES 1-500,  
Defendants.

\_\_\_\_\_ /

## MEMORANDUM

Several Defendants filed motions to dismiss the above-entitled action on the basis of lack of subject-matter jurisdiction and on other grounds. The motions were set for hearing on August 6, 1999. The motions were properly served and filed 28 days before that hearing date pursuant to Bankruptcy Local Rule 7007-1(a). On July 23, 1999, Plaintiff filed an ex parte motion to continue the August 6, 1999 hearing. The court returned the moving papers, stating that the court declined to consider the motion on an ex parte basis. Plaintiff's opposition to the motions was due on July 23, 1999 per Bankruptcy Local Rule 7007-1(b). Plaintiff had filed no written opposition as of August 4, 1999. On August 5, 1999, the court cancelled the August 6, 1999 hearing and stated its intention to dismiss the action for lack of subject-matter jurisdiction, because Plaintiff failed to file opposition to the motion to dismiss.

## FACTS

Plaintiff filed the above-entitled action (the Action) in the United States District Court on August 25, 1998. Plaintiff filed a petition under chapter 11 of the Bankruptcy Code in this court on August 28, 1998. On September 3, 1998, District Judge Sandra Brown Armstrong issued an order dismissing the Action with leave to amend. The order stated that the allegations raising 42 U.S.C. ' 1983 and federal RICO claims failed to state a claim upon which relief can be granted. The order noted the remainder of the allegations related to state-law claims over which the court had no independent basis of jurisdiction. The order allowed Plaintiff until September 14, 1998 to file an amended complaint, and stated that the action would be dismissed with prejudice if Plaintiff failed to meet that deadline.

Plaintiff never filed an amended complaint. Plaintiff did file a notice of removal to the Bankruptcy Court on November 12, 1998. Plaintiff's chapter 11 case was converted to one under chapter 7 on January 27, 1999. Judge Armstrong issued an order transferring the Action to the Bankruptcy Court on February 22, 1999. On April 22, 1999, Plaintiff filed an amended Schedule C in her bankruptcy case, claiming the Action exempt. Neither the chapter 7 trustee nor any other party in interest filed an objection to that claim of exemption, and the time for objecting has expired under Fed. R. Bankr. P. 4003(b).

## DISCUSSION

**1. Subject-matter jurisdiction.** The subject-matter jurisdiction of the Bankruptcy Courts is defined in 28 U.S.C. ' 1334(b): ANotwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.@

This court lacks jurisdiction over the Action under each of the three prongs of section 1334(b). First, the complaint clearly does not allege a cause of action arising in@ the bankruptcy case, because the acts alleged in the complaint occurred before the bankruptcy case was filed. Second, the claims asserted do not arise under@ title 11. The complaint contains no reference to title 11, nor can any of the acts alleged be construed to give rise to a claim created by title 11. Third, the claims asserted in the complaint are not related to@ the Plaintiff=s bankruptcy case. A claim is related to a bankruptcy case if it conceivably could have an effect on the bankruptcy estate. See In re Fietz, 852 F.2d 455, 457 (9th Cir. 1988). Plaintiff has claimed the Action exempt, and no timely objection was filed to that claim of exemption. Thus, any recovery on the action would benefit Plaintiff rather than the bankruptcy estate, and the Action is therefore not related to the bankruptcy case under Fietz.

**2. Judge Armstrong=s Order.** Having determined that the Bankruptcy Court lacks subject-matter jurisdiction over the Action, the question arises whether the Action should be returned to Judge Armstrong for final disposition of the federal question claims. I determine that such action is unnecessary.

Judge Armstrong=s September 3, 1999 order is a sufficient basis to dismiss the federal question claims. Per that order, the complaint was dismissed with prejudice regarding the federal claims if Plaintiff failed to file an amended complaint by September 14, 1998. That deadline may have been extended to October 27, 1998 through 11 U.S.C. ' 108(b). Plaintiff, however, has never filed an amended complaint. Thus, I determine that the federal claims have been dismissed with prejudice via Judge Armstrong=s September 3, 1998 order.

I interpret Judge Armstrong=s February 22, 1999 order transferring the Action to this court as relating only to the state-law claims raised in the complaint, not as affecting in any way her prior dismissal of the federal question claims. The Bankruptcy Court has broader jurisdiction over state-law claims

than the District Court.<sup>(1)</sup> Thus, it was appropriate for this court to consider whether it had jurisdiction over the state-law claims before those claims were dismissed. An

order from Judge Armstrong was necessary to get the Action before the Bankruptcy Court. Plaintiff=s notice of removal did not effect a transfer to the Bankruptcy Court, because 28 U.S.C. ' 1452 provides for removal to the District Court. Cases within the bankruptcy jurisdiction of the District Court get to the Bankruptcy Court via referral pursuant to 28 U.S.C. ' 157(a). Bankruptcy Local Rule 5011-1(b) provides, however, that an action pending in the District Court when the bankruptcy petition is filed is not referred automatic-ally, but only by order of the District Judge before whom the action is pending.

**3. Request for pre-filing order and attorneys fees.** I decline to enter an order precluding Plaintiff from filing future actions in the Bankruptcy Court. If Plaintiff files any future action over which this court lacks subject-matter jurisdiction, this court can dismiss that action before the Defendants are required to file a response, and can restrict future filings at that time.

I also decline to grant the request of Defendant Theoharis for an award of attorneys fees. Because this court lacks subject-matter jurisdiction over the claims raised by Plaintiff, I am reluctant to be drawn into an evaluation of the merits of the action for purpose of awarding fees. Nor would it be appropriate to award fees on the basis that the Plaintiff=s notice of removal was frivolous. At the time the Plaintiff attempted to have the Action transferred to this court, this court did have subject-matter jurisdiction, and many attorneys fail to understand the difference between Aremoval@ and Areferral@ of bankruptcy proceedings.

### **CONCLUSION**

All federal question claims are dismissed with prejudice as to all Defendants pursuant to the September 3, 1999 order of Judge Armstrong. All state-law claims are dismissed without prejudice as to all Defendants for lack of subject-matter jurisdiction.

Dated: \_\_\_\_\_

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Thomas E. Carlson

United States Bankruptcy Judge

1. // This court would have jurisdiction over those claims had the Action not been claimed as

exempt.

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